Catherine Walker-Jacks

Cambridge, MA | cwalkerjacks@jd23.law.harvard.edu | (857) 636-9208

June 14, 2023

The Honorable Beth Robinson
U.S. Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, Vermont 05401

Dear Judge Robinson:

I write to express my interest in a clerkship for the 2024-2025 term. I recently graduated cum laude from Harvard Law School. I have accepted a clerkship for the 2023-2024 term with Judge George O'Toole of the U.S. District Court for the District of Massachusetts.

As a lifelong New Englander who has spent significant time in the great state of Vermont, I would be thrilled to support the important work of your chambers in Burlington. Moreover, I am confident that my upcoming district court clerkship will equip me with the skills and experience to be an effective appellate clerk.

During law school, I pursued a diverse array of opportunities in order to gain exposure to numerous areas of the law and hone my legal research and writing skills. At the NAACP Legal Defense Fund and the Lawyers' Committee for Civil Rights, I helped to develop and execute the strategies for a significant civil rights lawsuit and a state policy advocacy effort. As a summer associate at WilmerHale, I researched and wrote about a range of complex legal topics, including state sovereign immunity and procedural issues in patent disputes. I also served as a legal extern for the nonprofit Creative Commons, where I researched legal issues raised by the advent of generative artificial intelligence. Before law school, I worked as a public sector consultant for Deloitte, routinely managing multiple time-sensitive deadlines for senior government clients.

Enclosed please find my resume, law school transcript, undergraduate transcripts (two because of transfer), and a writing sample. You will receive letters of recommendation from the following individuals:

- Professor Larry Schwartztol, lschwartztol@law.harvard.edu, (617) 998-1877
- Professor Peter Grossi, ptgrossi47@gmail.com, (703) 919-1590
- Professor Vicki C. Jackson, vjackson@law.harvard.edu, [prefers email]

Thank you for your time and consideration.

Sincerely,
Catherine Walker-Jacks
Catherine Walker-Jacks

Catherine Walker-Jacks

Cambridge, MA | cwalkerjacks@jd23.law.harvard.edu | (857) 636-9208

EDUCATION

Harvard Law School, J.D., Aug. 2020 – May 2023
Honors: *cum laude*
Dean's Scholar Prizes in Evidence, Advanced Topics in Anti-Discrimination Law, Reconstruction Originalism
Activities: *Harvard Law and Policy Review*, Executive Editor
Harvard Journal of Sports and Entertainment Law, Senior Articles Editor and Technical Editor
Equal Democracy Project, Director of Civic Engagement
Legislation and Regulation, Prof. Ryan D. Doerfler, Teaching Fellow

Brown University, B.A. in Political Science, Aug. 2014 – Dec. 2017
Honors: Pi Sigma Alpha (national political science honor society)
Activities: *The Brown Daily Herald* and *The Brown Political Review*

Colby College, Pursued B.A. in Government, Aug. 2013 – May 2014
Honors: Dean's List

EXPERIENCE

Hon. George A. O'Toole Jr., U.S. District Court, D. Mass, *Incoming Law Clerk,* Boston, MA 2023 – 2024

Prof. Vicki C. Jackson, Harvard Law School, *Research Assistant*, Cambridge, MA 2021 – present
- Conduct research to revise Comparative Constitutional Law casebook. Review and edit scholarship published in international law journals. Assisted in preparing testimony for the Presidential Commission on the Supreme Court.

Creative Commons, *Legal Extern,* Remote Spring 2023
- Researched the impact of generative artificial intelligence on copyright law.

WilmerHale, *Summer Associate and Incoming Litigation Associate,* Boston, MA Summer 2022
- Researched and wrote memoranda on patent law issues, including disputed patent priority dates and procedural issues that arise in Patent Trial and Appeal Board inter partes review proceedings.
- Researched state sovereign immunity and permissible forms of prospective injunctive relief to inform settlement negotiations with a state agency in pro bono litigation over withheld government benefits.
- Drafted sections of preliminary injunction motion arguing that state voting law violated federal law.
- Awarded John A. Payton Summer Associate Fellowship, sponsoring a summer split internship with NAACP LDF.

NAACP Legal Defense and Educational Fund, *Litigation Intern,* New York, NY Summer 2022
- Wrote several sections of a 90-page complaint filed in federal court challenging a state education law on First Amendment and Fourteenth Amendment grounds. Conducted extensive factual research, including analysis of legislative history, to demonstrate legislators' racially discriminatory intent. Interviewed plaintiffs, prepared declarations, and assessed jurisdictional issues, including standing.

Lawyers' Committee for Civil Rights, *Voting Rights Project Intern,* Washington, DC Summer 2021
- Researched and drafted memoranda addressing election law and voting rights issues, including redistricting processes, voter registration systems, election procedures, and election disinformation.
- Contributed to policy advocacy efforts encouraging a state to increase access to online voter registration; analyzed statutes and regulations and developed a proposal for policy change.

Deloitte Consulting, *Government and Public Services Analyst*, Washington, DC and Boston, MA 2018 – 2020
- Advised agency leadership at a federal health agency on the development of a new initiative to streamline the agency's response to the requirements of the President's Management Agenda.
- Supported information technology (IT) modernization at a defense agency; liaised between agency leaders and vendors to facilitate the implementation of new IT capabilities; implemented a digital knowledge management plan.

Google, *Political Advertising Fellow*, Washington, DC Summer – Fall 2016
- Managed and optimized multimillion-dollar digital advertising campaigns for major clients.

U.S. House of Representatives, Rep. Jim Cooper (TN-05), *Intern*, Washington, DC Summer 2015
- Wrote daily memos for Congressman Cooper on current events and congressional hearings.

INTERESTS

- Racquet sports of all types (most recently, pickleball), snowboarding, digital illustration, cooking, and photography.

Harvard Law School

Date of Issue: May 26, 2023
Not valid unless signed and sealed
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Record of: Catherine Walker-Jacks
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023 Cum Laude
Pro Bono Requirement Complete

JD Program

Fall 2020 Term: September 01 - December 31

1000	Civil Procedure 5 Rubenstein, William	H	4
1001	Contracts 5 Elhauge, Einer	P	4
1006	First Year Legal Research and Writing 5A Toomey, James	H	2
1004	Property 5 Mack, Kenneth	P	4
1005	Torts 5 Lazarus, Richard	P	4
	Fall 2020 Total Credits:		18

Winter 2021 Term: January 01 - January 22

1055	Introduction to Trial Advocacy Sullivan, Ronald	CR	2
	Winter 2021 Total Credits:		2

Spring 2021 Term: January 25 - May 14

1024	Constitutional Law 5 Jackson, Vicki	H	4
1002	Criminal Law 5 Kelly, Erin	P	4
1006	First Year Legal Research and Writing 5A Toomey, James	P	2
2170	Legal Profession Seminar Wilkins, David	H	2
1003	Legislation and Regulation 5 Renan, Daphna	H	4
	Spring 2021 Total Credits:		16
	Total 2020-2021 Credits:		36

Fall 2021 Term: September 01 - December 03

2000	Administrative Law Freeman, Jody	H	4
2035	Constitutional Law: First Amendment Weinrib, Laura	P	4
2293	Drug Product Liability Litigation Grossi, Peter	H	3
2697	From Protest to Law: Triumphs and Defeats in Struggles for Racial Justice, 1950-1970 Kennedy, Randall	H	3
	Fall 2021 Total Credits:		14

Winter 2022 Term: January 04 - January 21

2181	Local Government Law Anderson, Michelle	H	3
	Winter 2022 Total Credits:		3

Spring 2022 Term: February 01 - May 13

2042	Copyright Fisher, William	H	4
2048	Corporations Hanson, Jon	P	4
2310	Federalism and States as Public Law Actors Halligan, Caitlin	H	2
3098	Positive constitutionalism and effective government: The U.S. in Comparative Perspective Jackson, Vicki	CR	1
3100	Reconstruction Originalism Lessig, Lawrence * Dean's Scholar Prize	H*	2
	Spring 2022 Total Credits:		13
	Total 2021-2022 Credits:		30

Fall 2022 Term: September 01 - December 31

2905	Advanced Topics in Anti-Discrimination Law Schwartztol, Larry * Dean's Scholar Prize	H*	2
2068	Employment Discrimination Clarke, Jessica	P	3
2086	Federal Courts and the Federal System Goldsmith, Jack	H	5
2136	Introduction to Japanese Law Ramseyer, J. Mark	H	3
	Fall 2022 Total Credits:		13

Winter 2023 Term: January 01 - January 31

7000W	Independent Writing Lee, William	H	2
	Winter 2023 Total Credits:		2

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Assistant Dean and Registrar

Harvard Law School

Record of: Catherine Walker-Jacks

Date of Issue: May 26, 2023
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Spring 2023 Term: February 01 - May 31

2043	Copyright and Trademark Litigation Cendali, Dale	H	2
2079	Evidence Rubin, Peter * Dean's Scholar Prize	H*	2
2359	Food Law and Policy Broad Leib, Emily	H	2
8099	Independent Clinical - Creative Commons Lessig, Lawrence	CR	2
2169	Legal Profession Gordon-Reed, Annette	H	3

Spring 2023 Total Credits:	11
Total 2022-2023 Credits:	26
Total JD Program Credits:	92

End of official record

HARVARD LAW SCHOOL
OFFICE OF THE REGISTRAR
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LEX ET IUSTITIA

Assistant Dean and Registrar

June 07, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing this letter in strong support of the application of Catherine Walker-Jacks, Harvard Law School J.D. expected later this month, May 2023, to serve as your law clerk, following her clerkship in 2023–24 with the Hon. George A. O'Toole, Jr. of the federal District of Massachusetts. She is one of the absolute best of the many research assistants I have had over my more than three decades of law teaching and I am thus delighted to be able to recommend her to you in the highest of terms.

I have known Catherine since her first semester in law school, as a student in class and as a research assistant. Catherine was in a non-credit 1L reading group that I taught in her first semester of law school; we read in political theory and discussed the idea of representation in constitutional democracy. Over the weeks of our meeting, I came to look forward to her insightful and always constructive comments. Her second semester, she was a student in my large lecture class on U.S. Constitutional Law, where she did quite well, earning a grade of Honors; grades in that course were primarily based on a blind-graded final exam. In her second year, Catherine was a student in my 1-credit reading group on "Positive constitutionalism and effective government: The U.S. in comparative perspective," where she wrote very thoughtful reading responses, going well beyond what was required, and became a highly valued participant in class discussion.

She has served as my research assistant since summer 2021, and she is among the very best of the many HLS Research Assistants I have been fortunate enough to work with in my entire time at Harvard. (Indeed, I have asked her, if she has time this coming summer, even after graduation, if she might be available to help with further research on one of my projects.) I will elaborate below, both on her academic performance in Constitutional Law and her work as a Research Assistant.

Her exam in my Con Law class showed a very sure-footed, knowledgeable legal mind at work.

She tended in her answers to get very directly to the most important analytical question and the key caselaw. (I was surprised, in grading that exam, how many students did not place weight on the Jacobson v. Massachusetts case that we had studied in responding to an issue of the constitutionality of a particular mandatory vaccination program — in her paper it was noted, discussed, and analyzed quite early on.) She was able to see arguments on both sides of open issues, and also to indicate where the weight of the law clearly supported one view on a particular issue. The final essay asked students to consider the advantages and disadvantages of the approach to Congress's Section 5 of the Fourteenth Amendment power set forth in City of Boerne v. Flores, and she showed a clear appreciation of both. In addition to the final exam, all students in the class were required to write a two-page "thought piece" on an assigned topic. She was in a group whose assigned topic was to write on one or both of the following questions: Should Bush v. Gore have been treated as a nonjusticiable political question? Or, were Bush v Gore and Rucho v. Common Cause reconcilable? She advanced an interesting and well-constructed argument that the Court in Bush v Gore should have treated the issue before it as a nonjusticiable political question. Applying the Baker v. Carr criteria, she placed special weight on a "textually demonstrable commitment" of the issues to another branch. As an example of her clear writing and sturdy argumentation style, consider this passage: "As the dissent explains, the Twelfth Amendment commits this authority and responsibility to Congress. Moreover, the Electoral Count Act stipulates that Congress is the body to resolve counting disputes after attempts in the courts. Neither the Constitution nor federal statutes provide for any formal role for the Supreme Court in choosing the President …"

She plainly earned the Honors grade she received in my course. I note that since her first semester in law school, she has consistently earned many more grades of Honors than of Pass, and has earned "Dean's Scholar Prizes" — the highest grade that can be given at the law school — in two of her classes thus far; grades for this semester are not yet available. And she has maintained this record of academic accomplishment while at the same time being active in extracurricular activities, including two journals, engagements with the pro-democracy activities of public interest organizations, and serving as my research assistant.

Her RA work for me was so good, I believe I have given her memos to other RAs as a sample of the quality of work I am looking for. She has done different kinds of research tasks on a wide range of topics. In the summer of 2021, she did research for me summarizing the literature concerning term limits for Supreme Court justices, and also helped cite check my prepared statement to the Presidential Commission on the U.S. Supreme Court. Later in the summer she did a series of memos for me on some very difficult, technical legal questions about the status of the Chief Statistician of the United States, and of various other members of the Civil Service. Her research memos were clear, detailed, and very well-sourced. Thereafter, I gave her a very challenging assignment: to update a complex chart I had developed over three editions of a casebook on comparative constitutional law, reflecting various aspects of the structures of a dozen constitutional courts around the world. Her memo was an absolute model of clarity — with respect to each national court, there were roughly eight or nine categories of information; for each, she wrote a brief entry in the memo either confirming the accuracy of what was there and providing a current source in support or, in several instances, updating with new, more accurate information and additional sources. This required careful research in a number of different foreign legal systems; it is the kind of assignment that many students would find overwhelming. Catherine figured out how to approach and, more importantly, how to organize the research and presentation of her work, so that I could follow it all and ask targeted questions as they arose. The carefulness of her research and writing were just first-rate, and I have come to trust her

Vicki Jackson - vjackson@law.harvard.edu - 617-496-0555

work very highly. I have continued to ask for her help on projects in comparative constitutional law; recently, for example, Catherine did scrupulously clear and careful work cite checking an entire article — the publication of my Barendt Lecture (on the free press as a knowledge institution) — and improving its accuracy in so doing.

In response to a question about her own strengths, Catherine emphasized how in approaching a task, she is “deliberate in producing work that is not only factually accurate and comprehensive, but is also presented clearly and succinctly,” and how she tries to anticipate questions or objections. In her research work for me she has succeeded admirably in achieving these goals. I recommend her to you most highly and without any qualification.

Should you have any questions, please don’t hesitate to let me know. The best way to reach me is by email, vjackson@law.harvard.edu, to set up a time to talk. I hope this letter is helpful.

Sincerely,

Vicki C. Jackson

Vicki Jackson - vjackson@law.harvard.edu - 617-496-0555

Arnold & Porter

Peter T. Grossi
+1 202.942.5670 Direct
Peter.Grossi@arnoldporter.com

February 13, 2023

Re: Catherine Walker-Jacks, Clerkship Recommendation

Your Honor:

I am writing to recommend most enthusiastically Ms. Catherine Walker-Jacks for a position as one of your future clerks. Catherine was a student in my Drug Product Liability Litigation course at Harvard Law School in 2021. I believe she would make an excellent member of your chambers. In all the important attributes for a clerk -- analytical ability, legal writing, precision, intellectual honesty – Catherine is excellent.

By way of background, my course at Harvard is the outgrowth of 40 years of litigation at Arnold & Porter, where I was chair of its Litigation Department. In that capacity, I have had the opportunity to work with many fine young attorneys; and I believe Catherine measures up extremely well with them in terms of both her intellectual rigor and interpersonal skills.

My course at Harvard is a bit unusual in that, after we spend ten weeks reviewing the "black letter" law applying product liability principles to complex pharmaceutical cases, the class turns to the more practical aspects of such litigation and prepares, in individual pieces, a detailed "opening statement" they then present to jurors I recruit from the community at-large. During the semester the students also write a substantial "bench memorandum" analyzing a close set of facts (drawn from one of my cases) pursuant to a "motion for summary judgment." Last year they were required to apply the Supreme Court's opinions in *Wyeth v. Levine* and its progeny.

Catherine's performance on both the "bench memorandum" and "opening statement" were outstanding. Her memorandum quickly got to the heart of the problem, thoughtfully analyzed the facts supporting each side of the motion (from a hypothetical set of facts rather different from those presented to the Court), and then marshaled the authority to support her recommendation in an extremely effective manner. Her writing style was clear and concise; her form was excellent. Based on my experience (albeit many years ago) as a clerk on the Second Circuit, I think Catherine's was precisely the type of analysis a judge would prize.

Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW | Washington, DC 20001-3743 | **www.arnoldporter.com**

Arnold & Porter

Catherine's jury presentation -- which required her to distill "depositions" (which were actually portions of a trial transcript from a case I had litigated) and exhibits (internal documents and scientific studies) -- was also extremely well done. Her selections indicated a good sense of effective advocacy, as appropriately confined by the Rules of Evidence and "common sense." And the way she presented the material, both in her oral presentation and PowerPoint slides that I have each student prepare, likewise demonstrated a proper appreciation of persuasive legal and factual argument. Although I recognize that it is a clerk's role to help the Court evaluate such materials and the manner in which they were used at trial, rather than create them, I think that the exercise demonstrated that Catherine has an affinity for litigation that would serve her well as a clerk.

Finally, I would note that Catherine is a very personable young woman who gets along well with both peers and seniors. And she clearly possesses a strong work ethic and a seriousness of purpose that is good to see in any young person.

If you would like to discuss Catherine in any further detail, I would honored if you were to call (703-919-1590).

Sincerely,

/Peter Grossi/

Peter T. Grossi

May 18, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write in strong support of Catherine Walker-Jacks to serve as your law clerk. Catherine is a rigorous and creative thinker, a clear and efficient writer, and a young lawyer who is genuinely interested in the legal craft and committed to the profession's highest values. I think she would be a terrific clerk.

I taught Catherine in the Fall of 2022 in a seminar on Advanced Topics in Anti-Discrimination Law. Students in that class worked through complex legal doctrines, which they considered from various practical and theoretical perspectives. The material in class was often dense and demanding. In addition to regular participation, students were required to submit two papers over the course of the semester examining competing doctrinal and scholarly perspectives.

Catherine was the stand-out student among a very strong seminar group, and she received the only Dean's Scholar Prize awarded in that class (the equivalent to an A+ at HLS). She earned that exceptional grade due to several qualities that, I am confident, would make her an excellent judicial clerk.

First, her written work reflected her grasp of complex legal problems—as well as the context in which those problems arise, and the implications of different positions one might hold—and presented her arguments in clear and efficient prose. In one of her papers, she assessed different doctrinal approaches for assessing race-neutral policies designed to advance integrationist purposes. Her paper moved confidently between various threads of the doctrine, as well as competing scholarly accounts of how to explain the doctrine. Her analysis was also admirably unflinching in setting out her best view of existing doctrine, and its logical implications, even when that analysis pushed in a direction contrary to her normative starting point. Catherine's other paper considered a recent federal executive order directing agencies to take action to advance racial equity. In addition to engaging carefully with the assigned reading, she situated her discussion in a broader, and impressively sophisticated, understanding of administrative law. She again set out a nuanced discussion of hard legal and policy questions that reflected her grasp of the cross currents and the inescapable trade-offs of various approaches.

Second, Catherine's participation in class discussion was consistently superb. She engaged each week in a way that demonstrated a very impressive mix of confidence and humility, often identifying connections across issues (sometimes discussed several weeks apart) that advanced the class's conversation. She was equally effective in engaging theoretical or scholarly perspectives presented in the reading and in grasping the doctrinal and practical consequences of those viewpoints. In all these discussions, Catherine maintained a clear view of both the forest and the trees.

Third, Catherine brought to those discussions a steady, thoughtful, sensitive, and upbeat disposition. The topics we discussed in class can be challenging—many students come into a class on anti-discrimination law with deeply held philosophical or policy positions. That is a feature, not a bug, of such a class, but it makes it particularly important that the participants balance those deeply-felt personal views with an appreciation of the thorny intellectual questions and the array of available perspectives one might hold. Catherine clearly brought to the discussion her own moral compass and personal convictions—indeed, she came to the class with an interest in pursuing a career in civil rights. That commitment clearly energizes her approach to the law. At the same time, she does an excellent job channeling those convictions into a collegial and curious approach to discussion, which makes her advocacy in support of her views all the more effective.

I am confident that Catherine would bring these intellectual and personal qualities to the work of your chambers. If I can provide any further information, please do not hesitate to contact me.

Sincerely,

Larry Schwartztol

Larry Schwartztol - lschwartztol@law.harvard.edu

Catherine Walker-Jacks
Cambridge, MA | cwalkerjacks@jd23.law.harvard.edu | (857) 636-9208

Writing Sample

Drafted Spring 2022

I wrote the following paper for a Harvard Law School seminar called Reconstruction Originalism. It has not been edited by anyone else.

Catherine Walker-Jacks
Reconstruction Originalism
Professor Lawrence Lessig
May 2022

The Original Meaning of the Fourteenth Amendment and *United States v. Morrison*: An Originalist Defense of the Violence Against Women Act

I. Summary

This paper addresses the constitutionality of 42 U.S.C. §13981(c), the civil enforcement provision of the Violence Against Women Act of 1994 ("VAWA").[1] It argues that *United States v. Morrison*[2]—in which the Supreme Court held that VAWA's civil enforcement provision could not be enacted under Congress's Fourteenth Amendment Section 5 powers—was decided incorrectly as a matter of the original meaning of the Fourteenth Amendment and relied on a misunderstanding of Reconstruction-era precedent. This paper addresses these issues and then details a theory of state action and Congress's remedial powers known as "state neglect,"[3] which supports the constitutionality of 42 U.S.C. §13981(c).

II. Introduction

In *United States v. Morrison*, the Supreme Court invalidated a key provision of the Violence Against Women Act, a federal law criminalizing gender-based violence.[4] Congress passed VAWA in 1994 after reviewing extensive evidence of gender bias in state justice systems, which revealed manifest inadequacies in redress for female victims of gender-motivated

[1] 42 U.S.C. § 13981.
[2] 529 U.S. 598 (2000).
[3] *See generally* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011) (providing a thorough summary of the history of the "state neglect" theory).
[4] 42 U.S.C. § 13981.

violence.[5] To remedy these pervasive problems, Congress created a federal civil cause of action, subsequently referred to by the Court as the VAWA "civil remedy,"[6] that granted victims of gender-motivated violence the right to sue their alleged attacker in federal court.[7] By providing a federal forum, the "civil remedy" aimed to allow victims to avoid the "discriminatory treatment at the hands of state officials" that was thoroughly detailed in congressional task force reports.[8]

The circumstances that led the appellant in *Morrison*, Christy Brzonkala, to file a lawsuit under VAWA offer a paradigmatic example of the types of accounts that motivated Congress to develop the statute. Brzonkala alleged that she was violently raped by two football players, Antonio Morrison and James Crawford, during her first year as a student at Virginia Polytechnic Institute in 1994.[9] In early 1995, Brzonkala filed a university complaint against the men, leading to a protracted series of administrative hearings.[10] Ultimately, Brzonkala's alleged attackers avoided any sanctions from the university, as well as any criminal charges, even though Morrison had "admitted having sexual contact with her despite the fact that she had twice told him 'no.'"[11] According to Brzonkala, the alleged attack and its subsequent handling by authorities had a devastating impact on her life: the young woman fell into a depression, attempted suicide, and withdrew from the university.[12]

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[5] *Morrison*, 529 U.S. at 620 ("Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions … [and] concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime.").
[6] *Id.* at 601.
[7] 42 USC § 13981(c).
[8] *See* Samuel Estreicher & Margaret H. Lemos*, The Section Five Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 144.
[9] *Morrison*, 529 U.S. at 602.
[10] *Id.* at 603.
[11] *Id.*
[12] *Id.* at 602

In December 2005, Brzonkala filed suit against Morrison and Crawford in the U.S. District Court for the Western District of Virginia, invoking the civil remedy of VAWA. [13] Defendants moved to dismiss and argued, in relevant part,[14] that the civil remedy was unconstitutional because Congress lacked the power to enact the provision.[15] The district court agreed and dismissed the case after finding the civil remedy to be "an unconstitutional exercise of Congress's power, unjustified under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment."[16] On appeal, a divided panel of the Fourth Circuit Court of Appeals reversed, ruling that the Commerce Clause gave Congress the authority to enact the civil remedy.[17] However, the full Fourth Circuit vacated the panel's opinion and, after hearing the case en banc, affirmed the district court's dismissal of Brzonkala's claim.[18] The United States Supreme Court granted certiorari and then affirmed the en banc court's holding, ruling that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment provided bases for Congress to enact the civil remedy.[19]

III. Argument

This paper will address the Supreme Court's handling of the Fourteenth Amendment issue in *Morrison* and argue that the Court erred in finding that Congress exceeded its Section 5 powers in enacting the VAWA civil remedy. In *Morrison*, the Supreme Court relied on a bright-line rule that Congress is not authorized to pass legislation targeting private actors under Section 5, a rule the Court stated is compelled by the "firmly embedded" and "time-honored principle

[13] *See* Brzonkala v. Va. Polytechnic Inst. & State Univ., 935 F. Supp. 779 (W.D. Va. 1996).
[14] Crawford and Morrison also argued that Brzonkala failed to state a claim under VAWA. *Id.* at 784.
[15] *Id.* at 801.
[16] *Id.*
[17] Brzonkala v. Va. Polytechnic Inst. & State Univ, 132 F.3d 949, 953 (4th Cir. 1997).
[18] Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 889 (4th Cir. 1999) (en banc).
[19] U.S. v. Morrison, 529 U.S. 598, 601-02 (2000).

that the Fourteenth Amendment, by its very terms, prohibits only state action."[20] The Court largely derived this rule—a supposedly non-controversial and "longstanding"[21] limitation on Congress's power—from its 1883 decision in the *Civil Rights Cases*,[22] which found provisions of the 1875 Civil Rights Act to be an unconstitutional exercise of Congress's legislative powers.[23] The Court declared that its analysis of Section 5 was "controlled by" this decision, [24] demanding the conclusion that the VAWA civil remedy was unconstitutional because it operated directly on the private actors who perpetrated gender-motivated violence, rather than on the state.

The Court's conclusion on this matter is incorrect. As this paper will detail, contrary to the Court's assertions, the *Civil Rights Cases* need not be read as creating a categorical rule regarding the reach of Congress's Section 5 powers. Indeed, a "historically attuned"[25] reading of the *Civil Rights Cases* finds that the decision does not compel the cramped understanding of the Fourteenth Amendment attributed to it by the Court in *Morrison*. Moreover, an examination of the original meaning of the Fourteenth Amendment yields the opposite conclusion regarding the breadth of Congress's powers. An interpretation of the Fourteenth Amendment's Equal Protection Clause faithful to its original public meaning demonstrates that Congress *can* use its enforcement powers under Section 5 to craft provisions like the VAWA civil remedy that address failures of states to protect individuals from violence.

This paper proposes a strategy to defend the constitutionality of VAWA. Two doctrinal moves regarding the scope of the Fourteenth Amendment compose this strategy. [26] The first

[20] *Id.* at 621.
[21] *Id.* at 622.
[22] 109 U.S. 3 (1883).
[23] *Id.* at 26.
[24] *Morrison*, 529 U.S. at 602.
[25] BRANDWEIN, *supra* note 3, at 2.
[26] *See generally* Kermit Roosevelt III, *Bait and Switch: Why United States v. Morrison Is Wrong about Section 5*, 100 CORNELL L. REV. 603, 623 (2015) (describing the elements of the "state neglect" theory).

move argues that states can violate the Equal Protection Clause not only through action, as conventional state action doctrine holds, but also through *inaction* that has the result of denying individuals equal protection of the laws, such as by failing to provide victims of violence with redress. [27] The second move proposes that, in order to remedy this unconstitutional state inaction, Congress may target the *private* parties that perpetrate such violence (rather than the state officials who failed to redress it) because regulation of individuals can be an "appropriate" means for Congress to "enforce" the Equal Protection clause, pursuant to Section 5's text.[28]

Adoption of this reasoning by the Court would constitute a powerful shift in modern Fourteenth Amendment jurisprudence. Nonetheless, such an understanding of the Fourteenth Amendment's scope is not unprecedented. These two doctrinal moves compose a theory of Fourteenth Amendment powers and state action referred to by scholars as the "state neglect" theory.[29] State neglect was a well-known, "live theory of congressional power" during the Reconstruction era that featured in the Court's jurisprudence, but which lost prevalence over time. [30] Professor Pamela Brandwein—who has chronicled the theory's origin, evolution, and eventual decline in relevance—argues that state neglect is an integral part of "an entire jurisprudence of rights and rights enforcement [that] has been lost to twentieth-century observers."[31] Moreover, according to recent scholarship by Professors Randy Barnett and Evan Bernick that utilizes originalist methods to ascertain the meaning of the entirety of the Fourteenth

[27] *Id.* ("[A] state's failure to enforce its laws for the benefit of some group—a failure to protect them equally—is a violation of the Equal Protection Clause.").
[28] *See* U.S. Const. amend. XIV, § 5.
[29] *See, e.g.*, BRANDWEIN, *supra* note 3, at 15; *see* also Roosevelt, *supra* note 26, at 623; James G. Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 428 (2014).
[30] Roosevelt, *supra* note 26, at 634.
[31] BRANDWEIN, *supra* note 3, at 79 (describing the roots of "state neglect" and the concept's presence in cases such as United States v. Cruikshank, 92 U.S. 542 (1876), the Civil Rights Cases, 109 U.S. 3 (1883), and others).

Amendment, this understanding of the Equal Protection Clause most closely adheres to the clause's original public meaning.[32]

After introducing these concepts, this paper will address the two elements of state neglect and their application to VAWA and *Morrison*. This analysis begins with the idea that types of state inaction can violate the Equal Protection Clause and thus act as a trigger for Congress's Section 5 enforcement powers. Per this conception of the Fourteenth Amendment, states have an affirmative duty to protect individuals. If states fail to protect citizens through either action *or* omission, this can constitute an unconstitutional denial of equal protection of the laws. The notion of a "duty to protect" has featured prominently in Anglo-American legal thought for centuries, including in the anti-slavery movement and in the framing, ratification, and public understanding of the Fourteenth Amendment.[33] It encompasses, at a minimum, protection from physical violence.[34] Therefore, the duty to protect imposes an obligation on states to provide redress for all victims of violence, including gender-based violence. The extensive legislative record that led Congress to develop VAWA demonstrated that states failed to perform this duty.

To conclude, this paper will address the second element of state neglect, which would hold that although only states can violate the Fourteenth Amendment, Congress may address this violation by regulating non-state actors, through measures like the VAWA civil remedy. On this matter, this paper will show, first, that this reading of Congress's Fourteenth Amendment powers is not foreclosed by a case on which *Morrison* heavily relies, the *Civil Rights Cases*. After establishing that the *Morrison* majority's articulation of Section 5 is not compelled by precedent,

[32] RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT (2021).
[33] *Id.* at 321.
[34] *Id.* at 329. *See also infra* pp. 9-10.

this paper will argue that state neglect offers the most accurate understanding as a matter of original meaning.

A. The Fourteenth Amendment and the "Duty to Protect"

The United States, as intervenor in *Morrison*, defended the VAWA civil remedy on the grounds that Congress had found sex-based discrimination in state justice systems that violated the Fourteenth Amendment by depriving victims of gender-based violence equal protection of the laws.[35] This argument highlighted the demonstrated disparity in states' handling of crimes that "disproportionately affect[] women" versus comparable crimes against men, leading to "insufficient" and "inappropriate" treatment of women's claims of gender-motivated violence at every level, from investigation and prosecution to litigation and sentencing.[36] The United States argued that this disparity constituted unconstitutional, "purposeful discrimination," caused by "gender-based stereotypes" and "archaic prejudices" harbored by a range of state actors, including police officers, prosecutors, and judges.[37]

In *Morrison*, the Court did not question Congress's "voluminous" record demonstrating "pervasive bias" in state justice systems nor deny that states' alleged actions could violate the Equal Protection Clause.[38] However, the Court ultimately did not reach the question of whether this state conduct was unconstitutional; the majority announced intermediate scrutiny as the correct standard for assessing the constitutionality of "state-sponsored gender discrimination" but did not apply it.[39] Instead, the Court made the issue of remedy dispositive. The civil remedy was

[35] Brief for the United States at 2, U.S. v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).
[36] *Id.* at 19.
[37] *Id.* at 17-20.
[38] U.S. v. Morrison, 529 U.S. 598, 620 (2000)
[39] *Id.* at 621.

unconstitutional due to the "limitations on the *manner* in which Congress may attack discriminatory conduct."[40]

Recovering VAWA as a valid exercise of Congress's Section 5 powers would require that the Court actually evaluate the constitutionality of states' conduct and find a violation of the Equal Protection Clause. Indeed, even under the "state neglect" theory, infringement of rights by the state, rather than by private parties, is a necessary predicate for congressional enforcement under Section 5.[41] Under the concept of state neglect, however, the civil remedy's constitutionality would not depend on traditional gender discrimination doctrine. Instead, it would require that the Court adopt an understanding of the Fourteenth Amendment wherein states possess a constitutional duty to provide certain positive rights, including protection against physical violence—a notion previously rejected in the context of the Due Process Clause.[42] As this paper will detail, however, per its original meaning, the Equal Protection Clause "*requires* the impartial enforcement of the laws by state executive branch officials."[43] This requirement imposes not only a negative duty not to act discriminatorily, but also an affirmative duty "to protect" and to "take action to enforce laws and bring people who violate the rights of others to justice."[44] Therefore, in an effort to defend the VAWA civil remedy under the state neglect theory, the United States would argue that states had failed to meet this duty of protection, as evidenced by Congress's findings of inadequate treatment of female victims of violence.

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[40] *Id.* at 620 (emphasis added).
[41] *See* BRANDWEIN, *supra* note 3, at 35 (describing how, under the original understanding of the Fourteenth Amendment, Congress's "power to enforce rights was corrective, that is, contingent upon state rights denials" rather than "plenary," which would have allowed "federal enforcement of rights, regardless of state behavior.").
[42] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) ("We conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").
[43] BARNETT & BERNICK, *supra* note 32, at 34 (emphasis added).
[44] *Id.*

1. The Original Meaning of the Equal Protection Clause

The view of the Equal Protection Clause as encompassing an affirmative duty of protection enjoys broad scholarly support. Indeed, a litany of originalist scholars emphasize the word "protection" in "equal protection of the laws" and argue that this aspect of the Equal Protection Clause has been largely, and erroneously, ignored in Fourteenth Amendment jurisprudence.[45] Scholars vary regarding the outer limit of this state protection. At one end of the spectrum, some contend that this duty applies only to protection from private physical violence;[46] at the other end, some scholars take a more expansive view, arguing that the clause encompasses a broad range of positive rights to government resources, including protection from economic deprivation.[47] Nonetheless, "protection theorists" of all stripes agree that "protection against private violence is the central, minimal guarantee of the equal protection clause."[48]

Scholarship by Professors Randy Barnett and Evan Bernick, which employs "state of-the-art originalist methodology"[49] to uncover the historically-accurate understanding of the Fourteenth Amendment, supports the notion that protection by the state is the central promise of the Equal Protection Clause.[50] These scholars conclude that the original public meaning of the Equal Protection Clause encompasses a "duty to protect" and that the clause's "spirit"—the original function or purpose for which the clause was designed—is one of "anti-subjugation."[51] The Equal Protection Clause is therefore "directed at all state and nonstate conduct that enables

[45] *See* Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L. REV. 1, 8 (2021) (detailing a dozen scholars who view the Fourteenth Amendment as hinging on "protection").
[46] *See, e.g.*, Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1 (2008); Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L.F. 385 (1966).
[47] *See, e.g.*, ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994).
[48] Bernick, *supra* note 45, at 9.
[49] BARNETT & BERNICK, *supra* note 32, at 18.
[50] *Id.* at 34.
[51] *Id.* at 352.

some to exercise dominion and control over the life, liberty, and property of others."[52] Barnett and Bernick, by demonstrating that the Clause guarantees "equality in the protection of civil rights that are adjacent to natural rights,"[53] join the scholarly consensus regarding states' duties to, at a minimum, provide protection from physical violence, but otherwise occupy a middle position in the spectrum of protection theorists' views. The following section will detail findings from their originalist scholarship and then address application of this understanding to VAWA.

2. The Letter of the Law: Original Public Meaning

Investigation of the original public meaning of the Equal Protection Clause begins with inquiry into the "publicly available concepts [that] a competent user of the English language"[54] would have associated with the command that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[55] Public meaning originalists aim to derive the objective meaning of constitutional texts by focusing on prevailing linguistic practices and examining "patterns of word and phrase usage over extended periods of relevant time."[56] Barnett and Bernick's study of the meaning of the Equal Protection Clause demonstrates that the clause is grounded in the notion that government bears an obligation to provide protection of the laws. This duty of protection can be traced to the Lockean social contract theory of government, which posits that people provide allegiance to the government, thus forfeiting their own ability to enforce their natural rights, in exchange for "'the civil right' of government protection of their preexisting fundamental rights."[57] An examination of centuries of Anglo-American legal history demonstrates the prevalence of the notion that all people—including, significantly, law-abiding

[52] *Id.* at 354.
[53] *Id.* at 378.
[54] *Id.* at 5.
[55] U.S. Const. amend. XIV, § 1.
[56] Bernick, *supra* note 45, at 16.
[57] BARNETT & BERNICK, *supra* note 32, at 27.

noncitizens (who were perceived to have some allegiance)—were thought to be owed "a baseline level of protection for their natural rights to life, liberty, and property."[58] This conception of the right to protection had salience throughout both the Founding Era[59] and the Antebellum period, featuring prominently in abolitionist constitutionalism. Antislavery activists argued that the "government had a duty to secure all people under their authority against deprivation of natural rights by providing nondiscriminatory laws" and by enforcing those laws fairly and evenly.[60]

The "duty to protect" tradition also informed the drafters of the Fourteenth Amendment. During ratification, Republicans, including prominent framers of the amendment, consistently expressed an understanding of the Equal Protection Clause according to which the government had an affirmative duty to protect and "state inaction could constitute the denial of equal protection of the laws."[61] Accounts from the debates over the Enforcement Act of 1871 illustrate this understanding. Representative Garfield argued that even where "laws are just and equal on their face … [due to] neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them."[62] Additionally, Representative Pool declared that "[w]here any State, by commission or omission, denies this right to the protection of the laws, Congress may, by appropriate legislation, enforce and maintain it."[63] Given that Representatives Garfield and Pool were regarded as "speaking for the majority of Republicans,"[64] these powerful statements help to demonstrate that the concept of state neglect was central to the Fourteenth Amendment's meaning.

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[58] *Id.* at 322 (describing Lord Edward Coke's 1608 report in Calvin's Case).
[59] *See id.* (describing the Founding Era belief that government violated a "fundamental duty if it denied to anyone over whom it exercised coercive power the benefits of life, liberty, and property protective laws," which could "give grounds for revolution.").
[60] *Id.* at 323.
[61] *Id.* at 348.
[62] Cong. Globe, 42d Cong., 1st Sess. app. 153 (1871).
[63] Cong. Globe, 42d Cong., 1st Sess. 608 (1871).
[64] BRANDWEIN, *supra* note 3, at 40.

3. The Spirit of the Law: Original Purpose

Identifying the precise contours of the duty of protection, and then implementing the theory in contemporary controversies like *Morrison*, is aided by recourse to the "original spirit" of the Equal Protection Clause.[65] In fact, turning to the "spirit" is essential to effectuate the Equal Protection Clause, given that the clause neither bore a fixed meaning nor imposed specific state duties at the time of its development.[66] At the time, such line drawing was unnecessary due to the flagrant lawlessness of the day: Republicans confronted such obvious instances of states' failures to protect, like "the broad and systematic refusal to remedy Klan violence," that it was simply unnecessary to answer threshold questions regarding the clause's exact reach.[67]

Scholars argue that the spirit of the Equal Protection Clause is one of anti-subjugation; it was intended to "protect people against subjugation of their life, liberty, and property, whether by state or nonstate actors."[68] Accordingly, the clause was envisioned to provide for more than state protection of Black individuals against Ku Klux Klan violence, though this was certainly one of its principal objectives.[69] The spirit of the clause instead extends protection to all, regardless of whether one was part of a group "historically or recently oppressed."[70] That the spirit of the Equal Protection Clause is broadly "inclusive" is supported by the breadth of the clause's text—it contains "race-neutral language at a high level of generality"—as well as the sweeping language of the Republican discourse at the time of its adoption.[71] Moreover, the clause must be read against the aforementioned background social contract principle, according

[65] BARNETT & BERNICK, *supra* note 32, at 15.
[66] *Id.*
[67] BRANDWEIN, *supra* note 3, at 30.
[68] *See, e.g.*, BARNETT & BERNICK, *supra* note 32, at 351.
[69] *Id.*
[70] Bernick, *supra* note 45, at 38.
[71] BARNETT & BERNICK, *supra* note 32, at 353.

to which some protection by government is due to *all* possessors of natural rights, including even non-citizens.[72]

4. Application of the Duty to Protect to VAWA

As a matter of original meaning and purpose, therefore, a powerful argument exists that the Equal Protection Clause requires states to "provide services that secure natural rights to life, liberty, and property that all people possess in virtue of their humanity."[73] Under this view of the Equal Protection Clause, it is evident that Congress's record in developing VAWA makes a sufficient showing of unconstitutional behavior by states in the treatment of gender-based violence. The vast legislative history behind VAWA, which the Court credited in *Morrison*,[74] showed states' systemic failures in handling violent crimes primarily affecting women. Congress's ten years of hearings, which included testimony from victims and officials from numerous state justice systems, as well as twenty state task force reports on gender bias, uncovered that not only did states *deny* women protection of the laws, but states also *discriminated* by providing more robust remedies for male victims of similar crimes.[75] While the Equal Protection Clause's original meaning does not require evidence of group or class-based discrimination,[76] identification of gender disparities proves that state justice systems are capable of providing protection, yet failed to do so for female victims of violence.

[72] *See supra* pp. 10-11.
[73] BARNETT & BERNICK, *supra* note 32, at 350.
[74] *Morrison*, 529 U.S. at 620
[75] Brief for the United States at 8, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29).
[76] Bernick, *supra* note 45, at 38. ("The broad language of the Clause and Republican discourse surrounding it evinces a spirit that condemns all state and nonstate conduct that enables some to dominate the lives, bodies, and possessions of others, whether historically or recently oppressed, and whether or not they are members of what the Court would later describe as a "discrete and insular" minority.").

B. Section 5 and the Breadth of Congress's Enforcement Powers

Establishing and applying the "duty to protect" understanding of the Equal Protection Clause is significant. This constitutes the first component of state neglect: the idea that state inaction can violate the Equal Protection Clause. Another significant matter remains to be addressed, however. How may Congress enforce the Equal Protection Clause? Should Congress be permitted to legislate under Section 5 to address *state* inaction by regulating *non-state* parties? May Congress "act to redress the ill effects of unconstitutional state action without directly or explicitly compelling state actors to obey the strictures of the constitution?"[77] Or, is Congress constitutionally permitted to target only the state actors themselves?

A helpful lens through which to analyze this matter is to consider "two competing understandings" of the Fourteenth Amendment's state action limitation.[78] One understanding proposes that the limits on Congress's Section 5 powers are "ends-based," while the other submits that the limits are "means-based."[79] If the restraints are "ends-based," Section 5 permits Congress to act so long as an enforcement measure's ultimate *object* is to remedy states' unconstitutional behavior.[80] Under this view, Congress's *means* of enforcement need not be trained on altering state action. In the context of VAWA, the "ends-based" view would thus find that although states violated the Equal Protection Clause by failing to provide victims of private gender-based violence with adequate redress, Congress could nonetheless permissibly establish a *private* cause of action, provided that its goal in doing so was to counteract the effects of the unconstitutional state inaction.

[77] Estreicher & Lemos, *supra* note 8, at 150.
[78] *Id.* (outlining these two understandings of the Fourteenth Amendment).
[79] *Id.* at 151.
[80] *Id.*

Conversely, if Section 5 carries a "means-based" limitation—that is, a corresponding restriction on the manner in which Congress may act—then because Section 1 of the Fourteenth Amendment proscribes only state behavior, enforcement measures must target state actors, [81] such as biased state officials themselves. *Morrison* adopts the means-based view of Section 5, treating as dispositive the "manner" in which Congress sought to address states' treatment of gender-based violence, pursuant to the rule the Court derived from the *Civil Rights Cases*.[82] Nevertheless, as previewed in the introduction, the *Civil Rights Cases* can be read as consistent with state neglect. Moreover, the "ends-based" view of Section 5 offers a superior understanding considering the original meaning and "spirit" of the Fourteenth Amendment.

1. Analyzing Reconstruction-Era Precedent: the Civil Rights Cases

The Supreme Court cites the *Civil Rights Cases* to support its conclusion that Congress altogether lacks the power under Section 5 to legislate against private conduct to remedy unconstitutional state action.[83] In its discussion of the Fourteenth Amendment, the majority in *Morrison* adopts the "conventional" wisdom[84] that the *Civil Rights Cases* invalidated the public accommodation provisions of the Civil Rights Act of 1875 because these provisions "applied to purely private conduct," which is "beyond the scope of the § 5 enforcement power."[85] However, scholar Pamela Brandwein, who has extensively studied the decision's historical and "jurisprudential context," argues that the Court's holding actually rests on a narrower point.[86] Brandwein finds that when read in a "historically attuned" manner, [87] the rule from the *Civil*

[81] *Id.* at 152.
[82] BRANDWEIN, *supra* note 3, at 161.
[83] *See* U.S. v. Morrison, 529 U.S. 598, 621-25 (2000).
[84] BRANDWEIN, *supra* note 3, at 159.
[85] *Morrison*, 529 U.S. at 621.
[86] BRANDWEIN, *supra* note 3, at 170.
[87] *Id.*

Rights Cases should be understood as follows: "civil rights, such as are guaranteed by the Constitution . . . cannot be impaired by the wrongful acts of individuals, *unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings*."[88] When this passage is understood as the rule of the *Civil Rights Cases*, it is evident that the Court did not place private acts wholly beyond the Fourteenth Amendment's reach, though the decision certainly imposes limitations on which sorts of "wrongful acts of individuals"[89] can fall within the amendment's ambit.

Indeed, in accordance with this rule, individuals' acts *can* enter the domain of the Fourteenth Amendment when those acts "gain the imprimatur of the state" through state behavior, which includes the "failure to remedy" private deprivations of rights.[90] Therefore, rather than being treated as the death knell of measures like the VAWA civil remedy, the *Civil Rights Cases* ought to be read as consistent with the theory of state neglect and the ability of Congress to use Section 5 to reach private parties, in at least certain circumstances. [91] While the Court did hold that much of the Civil Rights Act of 1875 exceeded Congress's powers, this holding should be understood as the Court simply determining that the elements of state neglect had not been established—not that the very theory itself was unconstitutional. Under the Court's articulation of state neglect in the *Civil Rights Cases*, some form of state "support" or "sanction" was essential to support the constitutionality of corrective legislation.[92] Significantly, contrary to

[88] Civil Rights Cases, 109 U.S. 3, 10 (1883) (emphases added).
[89] *Id.*
[90] BRANDWEIN, *supra* note 3, at 165.
[91] *Id.* at 170-75. Pamela Brandwein describes Justice Bradley's identification of the Civil Rights Act of 1866 as valid Section 5 legislation under the 14th Amendment, because the law was "clearly corrective in its character." Justice Bradley's discussion of the 1866 statute, which provided penalties for "persons" who "should subject parties to a deprivation of their rights under color of any law. . . or custom," is critical for understanding the support for state neglect in the *Civil Rights Cases.* Justice Bradley's understanding of the concept of "color of law … or custom" included the idea that "individual race-based wrongs against civil rights, gain the color of law or custom . . . if state authorities systematically fail to punish them." *Id.*
[92] *Id.* at 163.

the *Morrison* majority's presentation of the *Civil Rights Case*,[93] the Civil Rights Act of 1875 was not premised on states' failures to act, which proved decisive for the Court's holding. [94]

It is unsurprising that modern observers often fail to observe these types of nuances in the *Civil Rights Cases* and other Reconstruction-era cases, scholars argue. Pamela Brandwein counsels that to fully understand and appreciate the significance of foundational nineteenth-century decisions, it is essential to investigate their full "jurisprudential context," which requires recovering a "lost" vocabulary of rights, duties, and conceptions of the U.S. Constitution.[95] Given the modern Court's continued reliance on decisions like the *Civil Rights Cases* to guide its interpretations of the Fourteenth Amendment, it is critical to analyze these opinions scrupulously—rather than merely rely on conventional wisdom—to ensure that accurate conclusions are gleaned. A historically-attuned reading of the *Civil Rights Cases* finds an articulation of the theory of state neglect, demonstrating that the case does not create the absolute rule regarding Section 5 powers cited by the Court in *Morrison*.

2. The Original Meaning and "Congress-empowering" Spirit of Section 5

In addition to precedent not requiring that a "means-based" limitation be imposed on Congress's Section 5 powers, such a stringent limitation would be at odds with the Fourteenth Amendment's original meaning and purpose. Analysis of the discretion afforded to Congress to enforce the Fourteenth Amendment must begin with the principle that the text of Section 5 itself

[93] *See* U.S. v. Morrison, 529 U.S. 598, 625 (2000) (suggesting that maladministration of state laws motivated the public accommodations provision of the Civil Rights Act of 1875).
[94] BRANDWEIN, *supra* note 3, at 68. As Brandwein details, Senator Charles Sumner, who introduced the Civil Rights Act of 1875, relied on a "radical Republican conception of congressional enforcement power" and believed that "the national government [could] directly enforce the rights of national citizenship, regardless of state behavior." Republicans in Congress had doubts about the law's constitutionality precisely because the law was not premised on state neglect, but Sumner refused to craft the statute such that it was conditional on state behavior. That the provision was ultimately signed into law, scholars argue, was not due to Congress's belief in its constitutionality but rather due to a confluence of factors, including, principally, Sumner's death and a lame-duck Congress that passed the law in his honor. *See id.*
[95] *Id.* at 2.

constitutes a judgment regarding comparative institutional competencies. Section 5 explicitly delegates to Congress—not the courts—the power to implement the Fourteenth Amendment, by empowering the legislature "to enforce, by appropriate legislation, the provisions of this article."[96] This delegation was not coincidental: around the time of the Fourteenth Amendment's passage and ratification, "confidence in the courts was at a low ebb."[97] As Senator Oliver Morton explained, the "remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts."[98]

In briefing before the Court in *Morrison*, respondents Morrison and Crawford employed a text-based argument to assert that VAWA exceeded Congress's powers. The civil remedy, respondents argued, could not be considered as an "appropriate" means to "enforce" state violations of the Equal Protection Clause because "'enforce' means to 'compel obedience to.'"[99] A remedy that targets private actors, the men contended, does not "compel obedience to" the Equal Protection Clause because that remedy would not "prohibit or deter" a state actor (the party who concededly violated the amendment) "from doing anything."[100] This conception of Congress's Section 5 power would broadly foreclose regulation that reaches private conduct, as this manner of regulation would not directly change the behavior of state actors.[101]

The United States proposed a broader theory of Congress's enforcement power in its *Morrison* briefing, describing Section 5 as permitting Congress to "remedy" and "correct" violations of the Equal Protection Clause.[102] This understanding of the extent of Congress's

[96] U.S. Const. amend. XIV, § 5.
[97] BARNETT & BERNICK, *supra* note 32, at 252.
[98] *Id.*
[99] Brief for Respondent Antonio J. Morrison at 36-37, U.S. v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).
[100] *Id.*
[101] *See* Estreicher & Lemos, *supra* note 8, at 149. ("Because legislation that targets only private actors presumably will not lead state actors to conform their conduct to the requirements of the Equal Protection Clause, this understanding of 'enforce' suggests that Congress can never reach purely private conduct under Section 5.").
[102] Brief for the United States at 45-47, U.S. v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

capabilities offers a superior conceptualization of the clause in light of the "Congress-empowering spirit" of Section 5.[103] In addition, many scholars, including Barnett and Bernick, find support for the fact that "the choice of the word 'appropriate' [in Section 5] appears to have been deliberately made to track the language of *McCulloch v. Maryland*."[104] During debates over the drafting of the Fourteenth Amendment, drafters "claim[ed] that *McCulloch* emphasized congressional discretion in adopting means to legitimate constitutional ends."[105] As such, when the Court considers the scope of Congress's Section 5 powers, it ought to apply the *McCulloch* principle and start with a "strong presumption of congressional good faith" as such an approach would honor both the precise language of the amendment and the "institutional understanding" underpinning the text.[106]

Applying these principles to VAWA yields the conclusion that the statute's means were appropriately tailored to the goal of addressing gender-based violence. Through the civil remedy, Congress created a corrective mechanism "in response to the States' sustained failure to deal effectively with the problem of violence against women."[107] These systematic failures, which would be unconstitutional under the duty to protect tradition, were thoroughly documented. Despite the existence of state criminal law and tort remedies, state officials continued to treat crimes like rape and domestic abuse "less seriously than other violent crimes."[108] The civil remedy addressed the effect of this state bias and endeavored to ensure that "practical enjoyment

[103] Bernick, *supra* note 45, at 54.
[104] BARNETT & BERNICK, *supra* note 34, at 251. *See also* Estreicher & Lemos, *supra* note 8, at 155 ("The link between the *McCulloch* necessary and proper standard and Section 5 was cemented in *Morgan,* where the Court stated that, '[b]y including § 5 the draftsmen sought to grant Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.'").
[105] *Id.*
[106] Bernick, *supra* note 45, at 55.
[107] Brief for the United States at 10, U.S. v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).
[108] *Id.*

of the equal protection of the laws" extended to all, including women.[109] By granting victims the opportunity to initiate federal lawsuits against their offenders—thus allowing women to seek redress outside of demonstrably biased state systems—the civil remedy was "narrowly tailored to the state's unconstitutional omission to act."[110] In light of the tailored nature of the VAWA civil remedy and the extensive fact-finding that preceded the statute's enactment, the Court should find Congress's approach in addressing violence against women "appropriate," as the *McCulloch* standard "requires courts to refrain from substituting their judgment for Congress's as to how to effectuate legislative goals."[111] Deference to Congress's choice of means would recognize the legislature's superior institutional competencies in crafting solutions to complex problems, while broadly honoring fundamental separation of powers principles.

IV. Conclusion

In *United States v. Morrison*, the Supreme Court hampered the ability of Congress to address the systematic failure of states to provide real redress for victims of gender-motivated violence. In the future, if the Court embraced the theory of state neglect, the civil remedy of VAWA could be recovered. The Court ought to do so. This shift in the Court's jurisprudence would result in an interpretation of the Equal Protection Clause and Section 5 that is consistent with precedent and faithful to the Fourteenth Amendment's original meaning.

[109] Estreicher & Lemos, *supra* note 8, at 155.
[110] BARNETT & BERNICK, *supra* note 34, at 364.
[111] Estreicher & Lemos, *supra* note 8, at 156.

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 05, 2023

The Honorable Beth Robinson
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Dear Judge Robinson:
June 05, 2023

The Honorable Beth Robinson
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Dear Judge Robinson:
I am a third-year law student at the University of Michigan, and I am writing to apply for a clerkship in your chambers for your upcoming term or any following term.

I am a competitive distance runner and a Type 1 diabetic. Balancing the rigors of law school with training and managing a chronic illness has taught me to be highly organized, diligent, and resourceful. These traits allowed me to succeed in my jobs before law school, where working as a legislative assistant and in political advertising, I utilized my ability to adjust to sudden changes and take ownership of large projects.

My internships in the Consumer Protection Branch of the New York Attorney General's Office and the National Consumer Law Center have strengthened my desire to be a public interest litigator. After law school, I will clerk in the U.S. Bankruptcy Court for the District of Delaware for Judge Craig T. Goldblatt. There, I hope to improve my legal research skills, engage with cutting-edge corporate bankruptcies, and gain experience with complicated commercial litigation that affects consumers. A further clerkship in your chambers will allow me to further refine my legal research skills and immerse myself in appellate writing and advocacy.

I have attached my résumé, transcripts, writing sample, and letters of recommendation from the following professors:

- Professor Julian Mortenson: jdmorten@umich.edu, (734) 763-5695; and
- Clinical Professor Oday Salim: osalim@umich.edu, (586) 255-8857.

Thank you for your time and consideration.

Sincerely,

Wesley B. Ward

Wesley B. Ward

308 Packard Street, Apartment 6, Ann Arbor, Michigan 48104
(309) 830-3879 • wbward@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, Michigan
Juris Doctor — May 2023
Journal: Michigan Journal of Law Reform, *Executive Editor*, Vol. 56
Activities: Research Assistant to Professor John A.E. Pottow; Global Antitrust Institute Moot Court Competition, *Quarterfinalist* (2023); Henry M. Campbell Moot Court Competition, *Participant* (2022), *Marshal* (2020-21); Environmental Law and Sustainability Clinic at Michigan Law (2022)

ILLINOIS STATE UNIVERSITY — Normal, Illinois
Bachelor of Science in Finance, *summa cum laude* and *Bachelor of Arts* in Political Science, *summa cum laude* — December 2017
Honors: Student Laureate of The Lincoln Academy of Illinois (2017) (one student honored from each Illinois university)
Robert G. Bone Scholarship (2017) (top academic honor at Illinois State)
Activities: Division I Cross-Country/Track & Field; Department of History Research Assistant

EXPERIENCE

U.S. BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE — Wilmington, Delaware
Incoming Law Clerk for the Honorable Craig T. Goldblatt — September 2023 – September 2024

OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA — Washington, D.C.
Pro Bono Research Lead — November 2022 – Current

- Directed a team of four Michigan Law students in researching and writing a substantive memo for the Office of Consumer Protection and coordinated our progress with supervisors in the District of Columbia and California.

NATIONAL CONSUMER LAW CENTER — Boston, Massachusetts
Summer Intern — May 2022 – August 2022

- Wrote articles addressing emerging legal theories to tackle problems faced by Fair Debt Collection Practices Act plaintiffs in gaining access to federal courts.
- Analyzed over 1,200 complaints from the Consumer Financial Protection Bureau's database regarding consumers' difficulties with rental debt collectors, culminating in drafting a 20-page white paper for NCLC.

OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL — New York, New York
Summer Intern, Consumer Frauds and Protection Bureau — June 2021 – July 2021

- Researched complex legal issues and drafted memoranda in preparation for litigation against small business loan providers and automobile loan providers engaged in illegal conduct.
- Analyzed and summarized materials provided by whistleblowers in an investigation of a for-profit college, and drafted document requests sent to the target of that investigation.

STATE OF ILLINOIS — Springfield, Illinois
Legislative Assistant to State Senator Ram Villivalam — November 2019 – August 2020

- Coordinated Senator Villivalam's capitol activities including filing legislation and meetings with stakeholders.
- Educated constituents on the latest local, state, and federal agency programs to help working people and small businesses during the pandemic-related economic downturn.

THREE POINT MEDIA — Chicago, Illinois
Production Assistant — May 2018 – December 2018

- Produced television advertisements for political campaigns with budgets from $100 thousand to over $25 million, including high-profile congressional, and gubernatorial campaigns in a high-pressure environment.

ADDITIONAL

Interests: Competitive marathon running and Type 1 Diabetes advocacy.
Volunteer: United Community Housing Coalition (2020-21), ALS Association (2019), The Immigration Project (2017).

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Ward,Wesley Barnes
Student#: 44896496

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020			**(August 31, 2020 To December 14, 2020)**					
LAW	510	002	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	B+
LAW	520	004	Contracts	Nicolas Cornell	4.00	4.00	4.00	B+
LAW	530	001	Criminal Law	David Moran	4.00	4.00	4.00	B+
LAW	593	008	Legal Practice Skills I	Nancy Vettorello	2.00		2.00	S
LAW	598	008	Legal Pract:Writing & Analysis	Nancy Vettorello	1.00		1.00	S
Term Total				**GPA: 3.300**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.300**		**12.00**	**15.00**	
Winter 2021			**(January 19, 2021 To May 06, 2021)**					
LAW	540	001	Introduction to Constitutional Law	Julian Davis Mortenson	4.00	4.00	4.00	A-
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00	4.00	4.00	A-
LAW	580	001	Torts	Roseanna Sommers	4.00	4.00	4.00	B+
LAW	594	008	Legal Practice Skills II	Nancy Vettorello	2.00		2.00	S
Term Total				**GPA: 3.566**	**14.00**	**12.00**	**14.00**	
Cumulative Total				**GPA: 3.433**		**24.00**	**29.00**	

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Control No: E196912401 Issue Date: 06/06/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Ward,Wesley Barnes
Student#: 44896496

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	637	001	Bankruptcy	John Pottow	4.00	4.00	4.00	A-
LAW	675	001	Federal Antitrust	Daniel Crane	3.00	3.00	3.00	A
LAW	741	004	Interdisc Prob Solv Identity Theft: Causes and Countermeasures	Barbara Mcquade Bridgette Carr Florian Schaub	3.00	3.00	3.00	A
LAW	768	001	21st C. Infrastr/Lawyer's Role	Andrew Doctoroff	2.00	2.00	2.00	A
LAW	885	001	Mini-Seminar American Ecological Writings	Nicolas Cornell	1.00		1.00	S
LAW	900	133	Research	Barbara Mcquade	2.00	2.00	2.00	A
Term Total				**GPA: 3.914**	**15.00**	**14.00**	**15.00**	
Cumulative Total				**GPA: 3.610**		**38.00**	**44.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	716	001	Complex Litigation	Maureen Carroll	4.00	4.00	4.00	A
LAW	803	001	Advocacy for Underdogs	Andrew Buchsbaum	2.00	2.00	2.00	A
LAW	930	001	Envt'l Law & Sustain Clinic	Oday Salim	4.00	4.00	4.00	A-
LAW	931	001	Envt'l Law & Sustain Clnc Sem	Oday Salim	3.00	3.00	3.00	A-
Term Total				**GPA: 3.838**	**13.00**	**13.00**	**13.00**	
Cumulative Total				**GPA: 3.668**		**51.00**	**57.00**	

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Control No: E196912401 Issue Date: 06/06/2023 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Ward,Wesley Barnes
Student#: 44896496

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	483	001	Judicial Clerkships	Kerry Kornblatt	2.00	2.00	2.00	A-
LAW	669	001	Evidence	Richard Friedman	4.00	4.00	4.00	A
LAW	677	001	Federal Courts	Leah Litman	4.00	4.00	4.00	B+
LAW	867	001	Antitrust and Democracy	Daniel Crane	2.00	2.00	2.00	A-
LAW	885	008	Mini-Seminar Lawyering in Washington, DC	Chris Walker	1.00		1.00	S
Term Total				**GPA: 3.666**	**13.00**	**12.00**	**13.00**	
Cumulative Total				**GPA: 3.668**		**63.00**	**70.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A
LAW	730	001	Appellate Advoc:Skills & Pract	Evan Caminker	4.00	4.00	4.00	A
LAW	797	001	Model Rules and Beyond	Bob Hirshon	3.00	3.00	3.00	A
LAW	815	001	Public Law Workshop	Julian Davis Mortenson Chris Walker	2.00	2.00	2.00	A
LAW	854	001	Anti-corruption Law & Practice	Chavi Nana	2.00	2.00	2.00	A
LAW	886	008	Mini-Seminar II Lawyering in Washington, DC	Chris Walker	0.00		0.00	S
LAW	900	220	Research	John Pottow	1.00	1.00	1.00	A+
Term Total				**GPA: 4.020**	**15.00**	**15.00**	**15.00**	
Cumulative Total				**GPA: 3.735**		**78.00**	**85.00**	

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

June 05, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

For the clerkship position, I highly recommend Wes Ward to you. Wes's analytic skills, writing abilities, and research persistence would greatly benefit your chambers.

Wes was a student in my Environmental Law & Sustainability Clinic. The Clinic provides students the opportunity to manage real cases for real clients. In the context of practicing energy, environmental, and conservation law, we focus on the following skills: writing for diverse audiences; research efficiency; representing organizational clients; and negotiation. In Winter 2022, he was enrolled in the clinic, which consists of a seminar class and case work.

Under my supervision, Wes represented two nonprofit organizations for whom he developed a litigation plan to address a facility that was polluting Lake Superior. Wes had to research a myriad of topics, including the public trust doctrine and water quality permitting. His research was meticulous and persistent. For his common law research, he efficiently found the most helpful and harmful case law. For his regulatory research, he thoroughly explored a dense complicated administrative scheme. When he hit a roadblock, he did not give up – he came to me with questions, returned to the research, and did not give up until he found what he needed.

Wes was a very good writer and analyst. He was thoughtful about core writing mechanics like organization, topic sentences, and matching his propositions with sufficient supporting evidence. He edited his memos effectively based on his own assessment and supervisor review. He always worked to see the legal forest from the trees of cases, statutes, and regulations.

Aside from being a good researcher, writer, and analyst, Wes had exemplary work ethic and a professional demeanor. He was punctual, communicated regularly, and was always prepared for meetings. He worked very well with his teammate. Perhaps most importantly, his clients were incredibly pleased with his work.

Wes's ability to engage in high level objective analysis and writing, combined with his work ethic and personality, make it easy for me to recommend him without reservation. If you wish to further discuss, please contact me anytime at osalim@umich.edu or 586-255-8857.

Sincerely yours,

Oday Salim
Director, Environmental Law & Sustainability Clinic

MICHIGAN LAW
UNIVERSITY OF MICHIGAN
701 South State Street
Ann Arbor, MI 48109-3091

JULIAN DAVIS MORTENSON
James G. Phillipp Professor of Law

June 06, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write with an enthusiastic recommendation of my student Wes Ward for a clerkship in your chambers. Wes is an incisive thinker, an earnest believer in public service, and a thoughtful and other-oriented human being. He'd be a terrific addition to your clerkship class both for the substance of his work and for his team play in chambers.

I first got to know Wes as a student in my first-year constitutional law class in the winter semester of 2021. Even in the somewhat odd hybrid circumstances of the class, Wes stood out from early on in the semester, in part because of his sheer command of the material on cold call, and in part because he attended every office hours bursting with questions for me—and enthusiasm for his classmates' perspective. He's the kind of person who is so intrinsically interested in the ideas being engaged with that the sheer intellectual generosity of his curiosity and enthusiasm is infectious. I came to think of him as part of the "glue" that would hold office hours conversations together, always finding a way to stitch together something Person A said with something Person B had said earlier. He had a way of doing this that was both useful and also made the conversation—all of which was taking place over Zoom, at least for office hours—feel more integrated and less like a series of one-off Q&A interventions

Wes did a terrific job on the exam, turning in a thorough, careful, insightful and creative set of responses to the essay questions—written with a clear and incisive style that made it easy to follow his analysis of even the most complicated questions. I was struck in particular by his discussion of a fact pattern involving Covid-related restrictions and requirements for a state bar exam; I had intended the question principally to test equal protection concepts, but in addition to thoroughly airing those issues, Wes went on to identify a very interesting set of Dormant Commerce Clause issues that I hadn't anticipated coming out of anyone's responses. It was a really impressive job.

Wes has come to law school with a strong sense of public service mission—the sort of earnest and realistic commitment to dedicating his career to helping others that is especially inspiring to encounter as a teacher. He worked before law school at a legal non-profit for low-income migrants, and has devoted much of his law school time—in the classroom, in extra-curriculars, and in the summers—to exploring a wide range of government and public interest career possibilities. He remains open to many public service possibilities, but it seems to me that the question of consumer protection occupies a place particularly close to his heart. In part this is because of his work experience at places like the New York Consumer Fraud and Protection Bureau, but more fundamentally I think it is connected to his own sense for the vulnerability of families facing hard questions about difficult situations. His father was diagnosed with ALS several years ago, and the process of trying to find treatments for what is an all-but-hopeless diagnosis opened Wes's eyes to the ways that consumer protection implicates some of the most vulnerable social relationships that exist. I really look forward to seeing where these interests take Wes over the course of his career, and I am confident that we can expect great contributions from him for decades to come.

I hope it's clear that I hold Wes in high regard, both personally and academically. Please don't hesitate to let me know if I can answer any questions or otherwise help you assess his candidacy in any way.

Best regards,

Julian Davis Mortenson
James G. Phillipp Professor of Law
Michigan Law School

Wesley B. Ward

308 Packard Street, Apartment 6, Ann Arbor, Michigan 48104
(309) 830-3879 • wbward@umich.edu

WRITING SAMPLE

I prepared this appellate opinion during the fall semester of 2022 for a Judicial Clerkships practice simulation. The case involved a fictitious high-school student who sought to place advertisements on Cleveland's public transit vehicles. Her application was rejected, then she filed suit on First Amendment grounds. Professor Kerry Kornblatt provided editorial suggestions, but this writing sample reflects my own work.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

_____

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY (RTA) and JOSEPH CALABRESE, individually in his official capacity as General Manager and Chief Executive Officer of the RTA

Defendants-Appellants,

No. 22-16123

v.

KATHERINE FISHER, through her parent and guardian NOAH FISHER

Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 22-cv-16123—Diane L. Clayton, District Judge.

Defendants Greater Cleveland Regional Transit Authority (RTA) and Joseph Calabrese appeal the district court's order granting a motion for preliminary injunction. Plaintiff-Appellee Katherine Fisher proposed an advertisement to appear on Defendant's vehicles, which RTA rejected for violating two of its policies. Ms. Fisher and her father sought a preliminary injunction relief requiring Defendant to display the advertisement, which the district court granted. We REVERSE the district court's order and REMAND with instructions that the Plaintiff's complaint be dismissed.

I. Background

A. Defendant-Appellant's Advertising Program

Defendant-Appellant Greater Regional Transit Authority (RTA) allows advertisements to appear on its vehicles, given the advertisements comply with certain policies. Defendant-Appellant Joseph Calabrese is the CEO and general manager of RTA and has overseen RTA's advertising program since its inception. R. 030. Proposed advertisements are submitted to a contractor who performs preliminary tasks, like providing the customer with a price estimate. Id. Each month, the contractor sends the proposed advertisements to Calabrese for review, who makes the final determination about whether the advertisements comply with RTA policy. Id.

RTA's advertising program seeks to "provide revenue for RTA while at the same time maintaining RTA ridership and assuring riders will be afforded a safe and pleasant environment." R. 042. Maintaining and increasing ridership sustains the financial health of the transit system, Mr. Calabrese argued, and that depends on riders having pleasant experiences. R. 037. RTA reserved the right to approve all advertising and displays through this program while prohibiting eight categories of advertisements including those that:

> a. Depict or promote an illegal activity.
> b. Contain false, misleading, or deceptive material.
> …
> e. Are scornful of an individual or a group of individuals.
> …

> g. Support or oppose the election of any political candidate.
> h. Contain material which is obscene or sexually explicit, as defined by Ohio law.

R. 042. Mr. Calabrese contends that the provisions at issue here, the policy against scorn and political advertising, are not "unusual." R. 038.

Mr. Calabrese reviews "a lot of ads" in his position, but few have "jump[ed] out to [him] as a problem." R. 033, 036. He rejected four advertisements in fourteen years for not complying with RTA policy. Two of the proposed advertisements supported political candidates, including one who was a personal acquaintance of Calabrese. R. 032. Mr. Calabrese could not recall why the other two advertisements were rejected but they were not for violations of the policy against scorn. R. 032–033. Mr. Calabrese mistakenly allowed an advertisement for bungee jumping at a national park, which is illegal under a federal regulation. R. 033.

Mr. Calabrese claims that he does not "just rubber stamp all of the ads" but scrutinizes them for noncompliance. R. 036. For example, when LeBron James left the Cleveland professional basketball team for the first time, an advertisement was proposed that "might have been scornful." R. 036–037. Calabrese consulted with "some members of the Board of Trustees" to decide that the advertisement did not violate RTA policy. R. 035. In another circumstance, Mr. Calabrese fact-checked a claim about a roller coaster. R. 036.

B. Plaintiff-Appellee's Proposed Application and Denial

Plaintiff-Appellee Katherine Fisher is a seventeen-year-old environmental advocate who applied to purchase an advertisement on RTA vehicles on June 15, 2022. R. 016, 019, 020. She considered RTA vehicles an ideal medium to spread her message outside of her existing school-based influence. R. 020. Fisher believes recycling is a pressing and important issue in Cuyahoga County, so her proposed advertisement read, "People who don't recycle are TRASH. By not doing your part you are stealing the future from your children and grandchildren. *for a greener tomorrow, support the only true pro-environment candidate: Yuna Bang for mayor*." R. 039. Her message intentionally

included "strong wording" that was "not meant to make someone feel good" but rather evoke frustration or anger. R. 022. The strong language was "the point." Id. The advertisement's endorsement of mayoral candidate Yuna Bang for Mayor "felt like an important opportunity to affect change." Id.

Ms. Fisher's application was rejected on June 29, 2022, and her subsequent appeal for reconsideration was denied on July 14, 2022. R. 040–041. Calabrese said this decision "was pretty easy." The policy "obvious[ly]" violated the prohibition on supporting a political candidate, R. 038, and "[t]he proposed ad called people quote unquote "trash."… Just imagine if someone on the bus called another rider trash to their face," so violated the scornfulness policy. Id.

C. Procedural History

Ms. Fisher brought this case on August 8, 2022, alleging RTA and Mr. Calabrese violated her First Amendment rights by denying her application and that RTA's policy is facially unconstitutional under the First Amendment. R. 008. She then filed a motion for preliminary injunction the following day. R. 010–011.

The district court granted relief to Ms. Fisher, ordering that the challenged advertisement be displayed. Fisher v. Greater Cleveland Regional Transit Authority (RTA), No. 22-cv-16123 (N.D. Ohio Oct. 12, 2022); R. 043–045. The court reasoned that RTA operated a public forum because it permitted political speech and inconsistently enforced its advertising policy. R. 044. RTA's policy was subjected to strict scrutiny, which RTA conceded that it could not meet. The court ruled in Ms. Fisher's favor, and RTA filed this timely appeal. R. 045.

II. Discussion

A. Standard of Review

This Court ordinarily reviews a district court's order granting a preliminary injunction for abuse of discretion, but when the First Amendment is implicated, *de novo* review is appropriate. Bays v. City of Fairborn, 668 F.3d 814, 819 (6th Cir. 2012). In

deciding motions for preliminary injunction, district courts weigh four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." Bays v. City of Fairborn, 668 F.3d 814, 818–19 (6th Cir. 2012). In the First Amendment context, the movant's likelihood of success on the merits predominates over the others, so this Court conducts *de novo* review. City of Fairborn, 668 F.3d at 819. See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 541 (6th Cir. 2007).

When determining whether a government entity's restriction on public speech violates the First Amendment, we first determine the type of "forum" at issue. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018). The Supreme Court recognized two types of fora at issue here: "designated public forums" and "non-public forums." Designated public forums have "not traditionally been regarded as a public forum" but which the government has "intentionally opened up for that purpose." Id. Governments may impose reasonable time, place, and manner restrictions on private speech in designated public forums, but content restrictions must satisfy strict scrutiny. Id. Non-public forums are not by tradition or designation a forum for public communication and the government retains the power to preserve the property for its dedicated purpose. Id. Restrictions to speech in non-public forums must be reasonable considering the forum's purpose and may not "suppress expression merely because public officials oppose the speaker's view." Id.

B. RTA Operates a Nonpublic Forum

[Court concludes that RTA operates a nonpublic forum.]

C. RTA's Restrictions and the First Amendment

Governments may restrict the content appearing in nonpublic forums, but those restrictions cannot discriminate based on the viewpoint expressed and must be reasonable given the forum's purpose. Am. Freedom Def. Initiative (AFDI) v. Suburban Mobility

Auth. for Reg. Transp. (SMART), 978 F.3d 481, 493 (6th Cir. 2020); Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018). RTA's ban on political candidate advertising is reasonable but its policy against scornful advertisements is not viewpoint neutral and violates the First Amendment.

1. Restriction on Speech For or Against Political Candidates is Reasonable.

RTA rejected Ms. Fisher's advertisement for violating the agency's policy against political candidate advertising. Unlike the policies in prior cases, this policy is clear and objective, indicating that it is reasonable under the law.

When a government restricts speech in a nonpublic forum, content limitations must be reasonable given the purpose of the forum. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). Reasonableness does not require the government to impose the least restrictive means to achieve a forum's purpose, nor must such purpose be compelling. Id. at 808. Rather, the restriction must only have a permissible reason and provide a "sensible basis for distinguishing what may come in and what must stay out." Mansky, 138 S. Ct. at 1888.

In Lehman v. City of Shaker Heights, a political candidate unsuccessfully challenged a city's ban on political advertisements on city buses. 418 U.S. 298, 299 (1974). The plaintiff wished to promote his candidacy for Ohio State Representative with advertisements on car cards. Id. at 299. The Supreme Court found, first, that the city operated a nonpublic forum, id. at 303, then ruled that the City had permissible reasons for imposing these content restrictions: short-term candidacy advertisements could jeopardize long-term commercial advertising, political advertisements could create doubts about favoritism, and riders "would be subjected to the blare of political propaganda." Id. at 304. The First Amendment, the Court held, does not require every publicly owned space to be open to every pamphleteer and politician. Id.

More recently in Minn. Voters All. v. Manksy, a political organization successfully challenged a prohibition on wearing political logos at polling locations

because the policy could not be applied reasonably. Mansky, 138 S. Ct. at 1892. The Court held that the polling locations were nonpublic forums, and Minnesota had a permissible purpose of creating an "island of calm" where citizens could peacefully vote. Id. at 1886–87. But the Court found that the state's definition of "political" was not capable of reasoned application. Id. at 1888–92. Minnesota's ban on materials that could be perceived as political issues carried with it inherent ambiguity. For example, a t-shirt reading "Support Our Troops" or "#MeToo" could be banned. Id. at 1889–92. The term "political" was "unmoored" and prone to "haphazard interpretation" rather than expressing an objective and workable standard. Id. at 1888. Despite these serious faults, the Court accepted that the insignia of political parties and candidates was "clear enough" to be reasonably restricted. Id. at 1889.

This Court followed this rationale two years later in Am. Freedom Def. Initiative (AFDI) v. Suburban Mobility Auth. for Reg. Transp. (SMART), where a civic organization challenged a transit agency's advertising policy against "political or political campaign advertising." AFDI, 978 F.3d at 486. With its policy, the transit agency sought "to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." The panel held the policy was unreasonable because the agency failed to adopt a "discernible approach" to determine what was allowed and disallowed. Id. at 494.

There, the Court reasoned that the term "political" was too ambiguous for reasonable application. In comparing "political" with "political campaign," it ruled that the latter lacked an "expansive reach" and could easily be identified by an objective person. Id. at 494, 498. Although someone could determine what is sufficiently "political" to warrant having their advertisement denied, "the subjective enforcement of an indeterminate prohibition increases the opportunity for abuse in its application." Id. at 497. In overruling the transit agency's policy against "political" advertising, the court concluded that the restriction on "political candidate" advertising suffered no such defect. Id. at 498.

Here, the challenged policy lacks the deficiencies of the Mansky and AFDI policies. RTA's policy against advertisements for or against political candidates had a permissible purpose, see Lehman, 418 U.S. at 303, and the policy is clear regarding which content is permissible and which is prohibited. AFDI, 978 F.3d at 498.

RTA had a permissible purpose when it banned advertisements by political candidates. Like Lehman, RTA sought to provide revenue, while assuring riders with a safe and pleasant experience. See Lehman, 418 U.S. at 304 (finding that short-term candidacy advertisements could jeopardize long-term commercial advertising and impose on captive riders). Ensuring that customers continue to use RTA services is central to the financial health of the transit system, and preventing these impositions advances that permissible purpose. R. 042, 037. This policy does not fit perfectly with its purpose. Political advertising permitted under RTA's policy could cause riders discomfort or jeopardize long-term commercial advertising. But the First Amendment does not obligate RTA to narrowly tailor its policy in this manner when it operates a nonpublic forum.

RTA's prohibition on advertising that advocates for or against a political candidate is clear and objective. The Mansky and AFDI courts both addressed policies that banned all "political" speech, not only speech involving candidates for office. Mansky, 138 S. Ct. at 1889; AFDI, 978 F.3d at 497. Those policies gave administrators discretion to decide whether an advertisement with overtones of public issues was actually "political" and therefore in violation of the policy. AFDI, 978 F.3d at 497. Both cases implied that prohibiting political candidate advertising was sufficiently clear. Mansky, 138 S. Ct. at 1889; AFDI, 978 F.3d at 498. That is precisely what RTA has done.

Ms. Fisher's proposed ad clearly violates RTA's policy. Her advertisement endorses "the only true pro-environment candidate: Yuna Bang for mayor," befitting of the "blare of political propaganda" that RTA sought to avoid. See Lehman, 418 U.S. at 304. RTA objectively determined that the ad violated its reasonable policy to protect the purpose of its forum.

RTA's prohibition on political candidate advertising is facially constitutional and, as applied to this case, does not violate Ms. Fisher's First Amendment rights.

2. Restriction on Scornful Speech is Viewpoint Discriminatory.

RTA also rejected Ms. Fisher's advertisement because it violated RTA's policy against scornful advertisements. Recent decisions from the Supreme Court and this Court compel us to hold that this policy is not viewpoint neutral and violates the First Amendment.

Public entities may implement reasonable content restrictions in nonpublic forums but may not impose restrictions that discriminate on the perspective expressed. Mansky, 138 S. Ct. at 1885–86. For example, the government may ban political campaigning on a military base, but if it were to allow such speech, it could not provide access to only the Democratic or Republican Party. See Greer v. Spock, 424 U.S. 828, 831, 838–40 (1976); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995). Similarly, the government may not determine that speaking in favor of one issue or cause is acceptable but speaking against it is prohibited. AFDI, 978 F.3d at 500. When the government acts in this manner, "it suggests that the government seeks to accomplish" more than the forum's assigned purpose, but instead seeks to suppress certain ideas. AFDI, 978 F.3d at 499 quoting R.A.V., 505 U.S. at 390.

Two recent Supreme Court decisions are pertinent to our analysis. In Matal v. Tam, 137 S. Ct. at 1751, an individual successfully challenged the denial of a trademark because the government's policy was viewpoint discriminatory. The government denied a trademark for "The Slants," an East Asian racial slur, because it violated the Lanham Act's disparagement clause. The Supreme Court held the clause was facially unconstitutional because the clause required the government to favor one moral standard and disfavors another. Passing judgment on the adequacy of a moral standard is viewpoint discrimination and therefore, impermissible under the First Amendment. Id. at 1763. Two years later in Iancu v. Brunetti, 139 S. Ct. 2294, 2297–2298, 2301 (2019), the government denied a trademark because the brand name resembled a vulgarity. A unanimous Supreme Court held that the "immoral or scandalous matter" provision of the

Lanham Act disfavored certain ideas while favoring others, which like Matal, was viewpoint discrimination. Id. at 2301–2302, citing Matal, 137 S. Ct. at 1751.

This Court applied Iancu and Matal to a transit advertising case, holding that a policy prohibiting advertisements that are "likely to hold up to scorn or ridicule any person or group of persons" violated the First Amendment. AFDI, 978 F.3d at 486. The Court explained that the transit agency's policy distinguished between two opposed sets of ideas: those promoting a group of people and those disparaging the group. Id. at 500. The transit agency prohibited an advertisement because it implied that Islam was a violent religion, but the agency conceded that an advertisement implying that Islam was a peaceful religion would be permissible. Id. The policy, if allowed, required a public official to decide in which contexts speech disparaged a person or group, and when an advertisement with a negative tone did not "hold up to scorn." This Court found that viewpoint discrimination did not vary "depending on the context," and accordingly, the policy could not stand. Id. at 501.

Here, the same logic applies. RTA's prohibition on advertising that is "scornful of an individual or a group of individuals" discriminates based on the viewpoint expressed.

The scornfulness policy requires a context-dependent analysis and enables a public official to pick which ideas may appear in the forum. Instead of prohibiting an entire subject of discussion, the policy distinguishes between two ideas: those that ridicule or scorn a group and those that support the group. See id. at 498, 500. By favoring speech that is not scornful, RTA's policy enacted the same error appearing in Matal, Iancu, and AFDI. See Matal, at 137 S. Ct. at 1763; Iancu 139 S. Ct. at 2301, AFDI, 978 F.3d at 486. A policy disfavoring scornful speech cannot be evenhandedly applied any more than a policy that prohibits disparaging or ridiculing a group of persons. See AFDI, 978 F.3d at 486, 501. These policies require public officials to make decisions depending on the context, indicating they are facially invalid under the First Amendment.

The unconstitutionality of RTA's scornfulness policy becomes clear when applied to this case. Ms. Fisher's proposed advertisement disparages people who do not recycle. The Supreme Court and our Circuit precedent dictate that this must be compared to an

advertisement that promotes people who do not recycle, rather than scorn them. See AFDI, 978 F.3d at 500 (comparing advertisements promoting church attendance to those ridiculing church attendees). If an advertisement praising people who do not recycle would be allowed, the policy unconstitutionally discriminates based on viewpoint. An advertisement that read, "Recycling is too expensive. Thank you for throwing your cans in the trash!" does not appear to violate any provision of RTA's policy, R. 042, and would likely be allowed.

We could further compare Ms. Fisher's advertisement that "People who don't recycle are TRASH" to an advertisement that read, "Not Recycling is Bad." The two advertisements share a perspective on recycling and have a negative tone, but the latter would be unlikely to violate RTA's policies. R. 042. Even so, an official must determine whether this advertisement was sufficiently disparaging to warrant the condemnation given the context of transit advertising. See AFDI, 978 F.3d at 501. Our precedent seeks to avoid this type of line drawing since viewpoint discrimination cannot vary depending on the context. Id. The official's discretionary decision would be impermissible under the First Amendment.

RTA's policy against scornful advertisement impermissibly chooses which viewpoints are allowed in its forum and is facially unconstitutional under the First Amendment.

III. Conclusion

The Court concludes that RTA permissibly rejected Ms. Fisher's proposed advertisement. Fisher cannot show she was harmed by the impermissible grounds for denial as the policies are separate and independently sufficient. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–86 (1977) (upholding a government action when there is a constitutional justification, even if the government considered an unconstitutional factor that supported the action). We, therefore, REVERSE the district court's order granting a preliminary injunction and REMAND with instructions that the Plaintiff's complaint be dismissed.